

# **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**No. 66**

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**WESLEY WILLIAM COX, PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 17, 1947.**

**CERTIORARI GRANTED JUNE 9, 1947.**

**No. 10917**

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**United States  
Circuit Court of Appeals**

**For the Ninth Circuit.**

**WESLEY WILLIAM COX,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

**Transcript of Record**

**Upon Appeal from the District Court of the United States  
for the District of Idaho  
Eastern Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD**

**DELLMORE LESSARD,**

Corbett Building,  
Portland 4, Oregon,

Attorney for Appellant.

**JOHN A. CARVER,**

U. S. District Attorney

**E. H. CASTERLIN**

**R. W. BECKWITH**

Assistant U. S. Attorneys  
Boise, Idaho

Attorneys for Appellee. [2\*]

In the District Court of the United States,  
In and for the District of Idaho,  
Eastern Division

No. 2678

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY WILLIAM COX,

Defendant.

INDICTMENT

United States of America  
District of Idaho—ss.

COUNT ONE

(50 USCA 305 (2) (g) )

P. 319. Also 311, and

Selective Service Reg. 653.12

The Grand Jurors of the United States of America, being first duly empaneled and sworn, in and for the District of Idaho, sitting at Pocatello, Idaho, in the name and by the authority of the United States of America, upon their oath do find and present:

That heretofore, to-wit: on or about the 26th day of May, 1944, in the County of Bannock, State and District of Idaho, Eastern Division, and within the jurisdiction of this Court, the defendant, Wesley William Cox, being then and there an assignee of Civilian Public Service Camp No. 67, Downey, Idaho, did, then and there knowingly, willfully, unlawfully and feloniously without proper

authority so to do, desert, leave and depart from said Civilian Public Service Camp No. 67.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

**S. REED ANDRUS**

Foreman of the U. S. Grand  
Jury

**R. W. BECKWITH**

Asst. United States Attorney  
for the District of Idaho.

Presented by the Foreman in open court and filed in the presence of the Grand Jury Oct. 17, 1944.

W. D. McReynolds, Clerk. [3]

[Title of District Court and Cause.]

### MINUTES OF THE COURT

October 23, 1944

Comes now the District Attorney with the defendant, Wesley William Cox, and his counsel, into Court, this being the time fixed by the Court for the defendant to plead to the Indictment. The Court asked the defendant if he plead guilty or not guilty of the offense charged in the Indictment and the defendant plead not guilty.

The Court fixed 10 o'clock, A. M., on Tuesday, October 24, 1944, to follow Case No. 2677, as time for trial. [4]

[Title of District Court and Cause.]

## VERDICT

Filed October 24, 1944

We, the Jury in the above entitled cause, find the defendant Guilty, as charged in the Indictment.

GEO. W. WALTERS

Foreman [5]

In the District Court of the United States

In and for the District of Idaho,

Eastern Division

No. 2678

UNITED STATES OF AMERICA,

Plaintiff,

vs:

WESLEY WILLIAM COX,

Defendant.

## JUDGMENT

Filed October 25, 1944

On this 25th day of October, 1944, came the United States Attorney, and the Defendant Wesley William Cox appearing in proper person, and with attorney, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to-wit: Violation Selective Training and Service Act, and the defendant having been now asked whether he has anything to say why



judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of 3 years and 3 months, and pay a fine of \$300.00, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

**CHASE A. CLARK**

United States District Judge.

The Court recommends commitment to a penitentiary. [6]

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[Title of District Court and Cause.]

**TRANSCRIPT**

This matter came on for hearing before the Honorable Chase A. Clark, at Pocatello, Idaho, sitting with a jury, on October 24, 1944.

Appearances:

John A. Carver, United States District Attorney

E. H. Casterlin, Assistant United States District Attorney

R. W. Beekwith, Assistant United States District Attorney

All of Boise, Idaho. Attorneys for the Plaintiff

Dellmore Lessard, Portland, Oregon, Attorney for the defendant.

G. C. Vaughan, Reporter [7]

October 24, 1944, 2:30 P.M.

(Jury qualified and selected)

The Court: Mr. Clerk you will read the indictment.

(Whereupon the indictment was read by the clerk).

The Court: You may make your opening statement Mr. Beekwith.

Mr. Beekwith: Ladies and Gentlemen of the Jury, the Government expects to prove that the defendant Wesley William Cox, was duly registered under the selective service and training Act with Local Board number 2 at Medford, Oregon; thereafter that they classified him as 4E and subsequently the Headquarters of the Selective Service designated that he be sent to Civilian Public Service Camp number 67; thereafter the Board ordered him to go to the camp; that he later did go to the camp and very soon thereafter deserted the camp without any authority and continued to remain away from the camp from the date he left about the 26th of May until this time.

The Court: Do you want to make your statement at this time?

Mr. Lessard: Yes, if the Court please. Ladies and Gentlemen of the Jury, the defendant who sits at my left will prove that he was registered with selective service board number two of Jackson county, Oregon; that he asked for a classification of 4D being a minister of the [9] gospel in the sect to which he belongs, Jehovah's witnesses; that he performed the duties of a minister of the gospel in that sect; that he devoted his full time as such; that for that reason he claimed the classification of 4D; that against his will and request the selective service board number 2 of Jackson county, Oregon, classified him as a conscientious objector. He contends that the board acted in excess of their authority and beyond its jurisdiction and contrary to law. For that reason the order of the Board requiring him to report at Downey, Idaho, was void and he was not bound to remain at the camp. This defendant comes before you now for the purpose of determining the question with respect to whether Local Board number 2 of Jackson County, Oregon, committed an error in classifying the defendant.

Mr. Beckwith: I object to the statement of counsel telling that the classification of the defendant was in error, or dealing with the classification of the defendant in any way, by the local board, and his request to be classified as 4D as being incompetent, irrelevant and immaterial to the issues in this case.

The Court: I will let the statement stand and I will instruct the jury as to the law at a later time.

## INA ALENDERFER,

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Beckwith:

Q. Will you state your name and residence?

A. Ina Alenderfer, Jackson Board number 2, Medford, Oregon.

Q. What is your occupation?

A. Chief Clerk of Local Board number 2.

Q. Selective Service Board Number 2 of Jackson County, Oregon. A. Yes, sir.

Q. How long have you occupied that position?

A. Ever since the first registration in September 1940.

Q. Is it your official duty to keep all the files and records of the men registered and filed with your board? A. Yes, sir.

Q. Do you keep such record? A. Yes, sir.

Q. Have you the record of Wesley William Cox the defendant in this case? A. Yes, sir.

Q. I wish you would take from that file form 1.

A. Yes, sir.

Q. Handing you plaintiff's Exhibit 1 marked for identification, I will ask you what that is?

A. It is the registrants card, showing that he registered on October 16, 1940. [11]

Q. Is that the registration card of the defendant Wesley William Cox? A. Yes, sir.

Q. Mr. Beckwith: We ask that it be admitted in evidence, at this time.

Mr. Lessard: No objection.

(Testimony of Ina Alenderfer.)

The Court: It may be admitted.

Q. I wish you would take form 40 and form 47 from the file. A. Yes sir.

Q. Handing you exhibit 2 marked for identification I will ask you to examine that and state what it is. A. This is the questionnaire.

Q. Of the defendant? A. Yes sir.

Q. What is exhibit 3 marked for identification?

A. Form 47 is the conscientious objector's form.

Q. Are these exhibits a part of your official records? A. Yes sir.

Mr. Beckwith: We ask that exhibits 2 and 3 be admitted in evidence.

Mr. Lessard: No objection.

The Court: They may be admitted.

Q. Did your Board receive from the National Selective Service Headquarters, a designation of which camp this defendant should be sent to? [12]

A. Yes sir.

Q. Does he have a 4E classification?

A. Yes sir.

Q. Did your Board order him to report for work of national importance? A. Yes sir.

Q. I wish you would take the form you received from National Headquarters designating the camp to which he should be sent?

A. It was the camp in Downey, Bannock County, Idaho.

Mr. Beckwith: I wish to have that marked for identification.



(Testimony of Ina Alenderfer.)

Q. Now; handing you exhibit 5 marked for identification, I will ask you what it is?

A. It is an Assignment To Work Of National Importance.

Q. Will you take from the file the form of Order requiring the defendant to report?

A. Yes sir.

Mr. Beckwith: I ask that this be marked as exhibit 6 for identification.

Q. Handing you exhibit 6 for identification I will ask you what it is?

A. It is an order to report for work of National Importance, the one we sent to him on May 18, 1944.

Q. When was he to report? [13]

A. On May 18th we ordered him to report on the 24th of May.

Q. Did he report? A. Yes sir.

Mr. Beckwith: We offer in evidence now, exhibits 5 and 6.

Mr. Lessard: No objection.

The Court: They may be admitted.

Mr. Beckwith: That is all, you may cross examine.

#### Cross Examination

By Mr. Lessard:

Mr. Lessard: May I have a few minutes to examine this file?

The Court: Yes, you may. We will recess for ten minutes. (Admonition to the Jury.)

(Testimony of Ina Alenderfer.)

3:05 P.M., Oct. 24, 1944

Q. Miss Alenderfer, the defendant Mr. Cox claimed to be a minister of the gospel.

A. Yes sir, he claims he is.

Q. In what denomination?

A. Jehovah's witnesses.

Q. He submitted documents in proof of his claim?

A. Yes sir.

Q. Which documents you have in the file?

A. Yes sir. [14]

Q. Do you have a letter dated March 17, 1943?

A. Yes sir.

Q. From the defendant?

A. Yes sir.

Q. Do you have another letter dated February 20, 1943?

A. Yes sir.

Q. And do you have a communication from the Watch Tower Bible and Tract Society purporting to be a certificate of ordination?

A. Yes sir.

Q. Dated January 18, 1943?

A. Yes sir.

Q. Do you have a letter dated December 16, 1942?

A. Yes sir.

Q. And a letter attached to two affidavits dated November 11, 1942?

A. Yes sir.

Q. An affidavit dated July 23, 1942?

A. Yes sir.

Q. And a letter dated June 22, 1942?

A. Yes sir.

Mr. Lessard: May we have those marked for identification?

The Court: Yes, they may be marked.

(Testimony of Ina Alenderfer.)

Q. Now showing you defendant's exhibits 7 to 14 inclusive will you tell the Court what these are? [15]

A. They are,—7 is that he applied to be reclassified from 4E to 4D.

Q. They are letters sent to the Board by the defendant or at his direction? A. Yes sir.

Mr. Lessard: We offer these in support of the defendant's claim that he is a minister.

Mr. Beckwith: We object to all of them on the ground that they are incompetent, irrelevant and immaterial to go before this jury to prove any of the issues in this case.

The Court: I will admit them as a part of the records and files of the draft board and later I will instruct the jury as to the law.

Mr. Lessard: In order that the jury may know what they are I will read a portion of one or two of them.

Defendant's exhibit 12 is a certificate from the Watch Tower Bible and Tract Society and reads as follows: "January 18, 1943. To whom it may concern: This is to certify that Wesley W. Cox is one of Jehovah's Witnesses, has been associated with the Watchtower Bible and Tract Society Inc., according to our records since January 1942.

"He was baptized in April 1942 and was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and estab- [16] lishing churches and generally preaching the gospel of the kingdom of God in

(Testimony of Ina Alexander.)

definitely assigned territory on November 2, 1942.

"Mr. Wesley W. Cox's entire time is devoted to missionary work. He has declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God. He has taken a course of study in the Bible and Bible helps prescribed by this Society and has shown himself apt to preach and teach this Gospel of the Kingdom. Matthew 24:14.

"He has the Scriptural ordination to preach this Gospel of the Kingdom. Isaiah 61:1, 2. Isaiah 52:7. He is, therefore, declared by this Society a duly ordained minister of the Gospel and is authorized to represent this Society and preach this Gospel of the Kingdom, proclaiming the name of Jehovah God and Christ Jesus, his King" This is signed Watchtower Bible and Tract Society by T. J. Sullivan,—I think those are the initials,—Superintendent of Evangelists, and it is subscribed and sworn to on the 18th day of January 1943 before a Notary public.

Now, a letter from the defendant to Local Board number 9 of Susanville, California dated February 20, 1943 reads as follows: "Local Board No. 9, Susanville, California Gentlemen: I received your order to report for induction in a Public Service Camp on March 9, 1943. At the present time [17] my case is on appeal at National Headquarters of Selective Service, Washington, D. C. I am not a religious objector as the local and state authorities of Oregon have classified me, but I am a minister of the gospel and have filed photostatic copy of my certificate of ordination with them. They refused

(Testimony of Ina Alenderfer.)

to consider this proof, so it was necessary for me to appeal to National Headquarters. I request that you withhold action in my case until a decision is reached by National Headquarters. Respectfully yours, Wesley W. Cox."

Then there is an affidavit signed by Elmer Halbert and it reads as follows: "July 23, 1942. To Whom It May Concern: I, Elmer Halbert, Company Servant of the Ashland Company of Jehovah's Witnesses do hereby affirm and swear that Wesley W. Cox has been connected with our organization six months and that he regularly and customarily serves as a minister by going from house to house and conducting Bible Studies and Bible Talks, and is therefore duly commissioned and ordained by the Almighty God and the Watchtower Bible and Tract Society as a minister of the Gospel as set forth in the Bible in the following scriptures: Isaiah 61; 1,2. 43;9,12. Matthew 10;7,12. 24;14. Acts 20;20. 1 Peter 2;21. 1 Cor. 9;16." Signed Elmer Halbert, and it is subscribed and sworn to before a Notary Public.

And also a letter exhibit 9, from Wesley W. Cox to Local Board No. 1 of Medford, Oregon, dated November 11, 1942, and reads as follows: "Dear Sirs: Find enclosed two [18] affidavits, one by the Company Servant of the Ashland Company of Jehovah's Witnesses, stating that I am an ordained minister and that I do the work of a minister. The other affidavit is a statement showing what classifications I have received from the Local Board, what



(Testimony of Ina Alenderfer.)

classification I claim and the reasons for so claiming, also that I am now in the Pioneer service as a full time publisher of God's Kingdom. Like affidavits have been sent to the Watchtower Bible and Tract Society for filing with National Headquarters for consideration and adding my name to the certified list. I request that you withhold action concerning my case until a decision is reached by National Headquarters." That is signed by Wesley W. Cox and that has attached to it two affidavits setting forth the fact that he is a minister of the gospel in that territory.

We have no further questions of this witness.

Mr. Beckwith: That's all.

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ORIN BEECHY,

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Beckwith:

Q. State your name and residence.

A. Orin Beechy, Downey, Idaho.

Q. And your occupation.

A. Camp Director, Civilian Public Service  
Camp number 67.

Q. How long have you been director of civilian public service [19] camp 67?

A. Since June 7th.

(Testimony of Orin Beachy.)

Q. This year? A. Yes sir, 1944.

Q. Are you acquainted with a man by the name of Lloyd H. Hess? A. Yes sir.

Q. Was he ever camp director of that camp 67?

A. He was acting camp director.

Q. Was that before you became director?

A. Between the time the other director left and the time that I arrived.

Q. As director of that camp do you have a record of the men at the camp?

A. Yes these files are the records.

Q. Those are the files you are required to keep?

A. Yes sir.

Q. I wish you would take form 50 and form 121 from that file? A. Yes sir.

Q. Now, handing you exhibit marked 15 and also marked 16 for identification, I will ask you to examine and state what they are.

A. Exhibit 15 is an order to report for work of national importance, that is D S S form 50.

Q. Does that show the date the defendant arrived at the camp?

A. Yes, the 26th of May 1944 he arrived.

Q. What is exhibit 16? [20]

A. Exhibit 16 is the form of the National Service Board for religious objectors, it is called form N B S 121.

Q. That is the form on which you report matters to the National headquarters?

A. Yes, sir.

Q. Do these forms you have refer to the de-

(Testimony of Orin Beachy.)

defendant, Wesley William Cox?

A. Yes they do.

Mr. Beckwith: We offer in evidence exhibits 15 and 16.

Mr. Lessard: No objections.

The Court: They may be admitted.

Q. Do you have in your file a letter written by the defendant to the camp director on or about the 26th day of May, 1944?

A. Yes I have a letter written by Wesley W. Cox on the 26th day of May, 1944.

Q. Handing you exhibit 17 marked for identification I will ask you to state what it is?

A. It is a statement of Wesley W. Cox made to Mr. Nebel. However, Mr. Nebel was not there on his arrival and Mr. Lloyd Hess was acting director.

Q. Is that a part of your official file there?

A. Yes, sir.

Mr. Beckwith: We offer in evidence Exhibit 17.

Mr. Lessard: No objection. [21]

The Court: Admitted.

Q. Mr. Beachy, has the defendant been in Civilian Public Service Camp No. 67 since you have been director?

A. Not to my knowledge.

Mr. Beckwith: That is all.

### Cross Examination

By Mr. Lessard:

Mr. Lessard: In order that the jury may know the contents of Exhibit 17, which is a letter from the defendant to the camp director, I will read it at this time. "Downey, Idaho, May 26, 1944. Civil-

(Testimony of Orin Beachy.)

ian Public Service Camp No. 67. Downey, Idaho.  
Dear Mr. Nebel: By order of local draft board No. 2, Medford, Oregon, I, Wesley William Cox am reporting to this Civilian Public Service Camp.

"Due to the fact that I am a minister of the Gospel, one of Jehovah's Witnesses, I am unable to remain in the camp for the reason that by so doing I would be placing myself in a position where it would be impossible for me to fulfill my commission to preach the Gospel as the Lord has commanded.

"I believe that I have been wrongfully classified by my local board in spite of the fact that I have furnished them conclusive proof of my ministerial status. I am reporting to this camp in compliance with the draft board's orders, and by so doing I am taking the last step in the [22] administrative process under the selective service system. If I am indicted by the Federal Civil Courts for violating the draft law, then by following the procedure outlined in the late Supreme Court's decision in the Billings case, I should be given the opportunity, as a defense to the indictment, to demonstrate the arbitrariness or unfairness of action against me by the local board.

"I am reporting to this camp solely for the purpose of completing the administrative process under the selective service system, in order to secure a review in the courts of my arbitrary classification under the Billings decision. Very truly yours, Wesley W. Cox. To Whom This May Concern: This

(Testimony of Orin Beachy.)

is to certify that Wesley William Cox reported to C. P. S. Camp No. 67, Downey, Idaho, May 26, 1944. Lloyd H. Hess, Acting Camp Director. Dated May 26, 1944."

Mr. Lessard: No questions of this witness.

Mr. Beckwith: That is all, the Government rests.

Mr. Lessard: I desire to make a motion for a directed verdict based on the same grounds as in the previous case and my authorities will be the same.

At this time the defendant moves for a directed verdict of not guilty for the reason that it has not been shown by the Government that the defendant has been correctly classified, in this, that the defendant—strike that—[23] it is not shown that the Government has considered any evidence showing anything to the contrary to the defendant's contention that he is a minister of the gospel or the certificate of ordination or the statement of the company servant that he is a regular minister of the gospel. According to the showing made the draft board has not considered any of these matters, and also that the defendant has shown by letters introduced repeatedly requesting a classification of 4D that he is a minister of the gospel.

The Court: The motion will be denied at this time unless you want to argue it further.

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WESLEY WILLIAM COX

being called as a witness on the part of the defend-



(Testimony of Wesley William Cox.)

ant. after being first duly sworn, testifies as follows:

*Direct Examination*

By Mr. Lessard:

Q. State your name to the jury?

A. Wesley William Cox.

Q. Where do you reside?

A. Ashland, Oregon.

Q. How long have you resided there?

A. Since 1922, in that vicinity.

Q. With whom do you live?

A. With my wife.

Q. How long have you been married? [24]

A. A little over two years.

Q. What is your occupation or business?

A. Minister of the gospel.

Q. How long have you been a minister of the gospel?

A. Since the first part of 1942.

Q. Tell the jury how you happened to become a minister.

Mr. Beckwith: Objected to as incompetent, irrelevant and immaterial.

The Court: Yes, I think it is, but I will let him answer.

A. I became a minister by studying the Bible and Watchtower publications. I have been interested in studying God's work since childhood and I have been interested in being a minister when I saw the truth as set forth in these tracts. I devote all my time to this work. I am still a minister of the gospel; I asked the board to give me that classification so I could carry on the work without

(Testimony of Wesley William Cox.)

hindrance and they have refused.

Mr. Beckwith: I object to this sort of statement.

The Court: Yes, sustained.

Q. What are your duties as a minister?

Mr. Beckwith: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Do you carry on the work usually carried on by a minister? [25]

A. Yes, I do work that is done by ministers. I preach from house to house as the apostles did in Jesus' time. I conduct funerals and I instruct the Bible in homes, that is the way the work is directed—the work of God's kingdom.

Q. Did you ask for a conscientious objector's classification?

A. I claim to be a minister. I filled the conscientious objector's form but I claimed to be a minister.

Q. What classification did you ask for?

A. 4D.

Q. Did you submit proof of your standing as a minister?

A. Affidavits of others that know of my activities; a certificate of ordination from the Watchtower Bible and Tract Society which is recognized by the Selective Service. That is sufficient proof.

Mr. Beckwith: I move to strike the entire answer as incompetent, irrelevant and immaterial.

The Court: I will let it stand.

(Testimony of Wesley William Cox.)

Q. Did you receive an order from the draft board to report at Civilian Service camp at Downey, Idaho, and did you report?

A. I complied with their order. I reported and handed him a letter explaining why I reported so as to exhaust all administrative process.

Q. And did you leave the camp?

A. Within fifteen minutes. [26]

Q. Explain why you left?

A. As I explained in the letter: according to the Billings decision it seemed that I should be given an opportunity to prove the arbitrary and unfair action in classifying me—

Mr. Beckwith: Objected to as incompetent, irrelevant and immaterial, there is no evidence of any arbitrary classification.

The Court: I will instruct the jury as to the law. The answer may stand, I want all the facts to go to the jury.

Mr. Lessard: You may examine.

### Cross Examination

By Mr. Beckwith:

Q. You left the camp at Downey without any authority?

A. I left the same day I reported.

Q. Without any authorization from anybody in charge of the camp.

A. That's right.

Q. You have never been back since.

A. No, sir.

Mr. Beckwith: That is all.

Mr. Lessard: That is all.

**DORIS COX**

called as a witness on the part of the defendant,  
after being first duly sworn, testifies as follows:

[27]

**Direct Examination**

By Mr. Lessard:

Q. State your full name to the jury.

A. Doris Elizabeth Cox.

Q. You are the wife of Wesley William Cox?

A. Yes, sir.

Q. How long have you been married?

A. Two years.

Q. Where do you live?

A. Ashland, Oregon.

Q. What is your religious belief.

A. I am one of Jehovah's Witnesses.

Q. How long have you been a Jehovah Witness.

A. Since 1941.

Q. Do you know whether your husband is recognized by other Jehovah's Witnesses as a minister?

A. He is, and he is recognized by the Watchtower Bible and Tract Society as an ordained minister, they have furnished us with a certificate issued to him.

Mr. Beckwith: Move to strike the answer as incompetent, irrelevant and immaterial.

The Court: It may be stricken.

Mr. Lessard: That's all, you may examine.

Mr. Beckwith: No cross examination.

Mr. Lessard: Defendant rests.

Mr. Beckwith: No rebuttal. [28]

The Court: You may proceed with your argument to the jury.

(Whereupon counsel made their respective argument.)

### INSTRUCTIONS

The Court: Ladies and Gentlemen of the Jury: Before you were called upon to serve as trial jurors in this case, a grand jury had returned an indictment against the defendant charging him with the offense of wilfully, knowingly and unlawfully and feloniously and without proper authority so to do, desert, leave and depart from Civilian Public Service Camp No. 67.

The indictment has been read to you and from the reading of the indictment and the evidence introduced in the trial you are familiar with the charge. The indictment is in itself no proof of guilt. It is a mere formal accusation made by the Government against the defendant, charging him with the commission of an offense. The Government thus advises him, in advance of the trial, of the issues he must meet in order that he might prepare his defense, and hence he is not to be prejudiced, nor are you to be influenced by the mere fact that he has been indicted.

The defendant has pleaded "not guilty" which means that he denies the allegations of the indictment.

When you go to your jury room, and indeed during your entire deliberations, you will bear in mind



and be governed by the general rule that the defendant in this case is presumed [29] to be innocent of the offense charged until his guilt is proved by competent evidence beyond a reasonable doubt. The burden is therefore upon the Government to prove the material allegations of the indictment beyond a reasonable doubt.

You will note that the phrase is "reasonable doubt." It is just such a doubt as the term implies, and is one for which you can give a reason. It means a doubt which is reasonable in view of all of the evidence, growing out of the testimony in the case, or the lack of testimony. So generally, I may say, that after you have fairly and impartially considered all the evidence, with a sincere and reasonable effort to reach a conclusion, you can candidly say that you are not satisfied of the defendant's guilt—if you still entertain such a doubt as would cause you to hesitate in the most important affairs of life—then you have a reasonable doubt and your verdict should be for the defendant. But on the other hand, if, after an impartial and earnest consideration and comparison of all the evidence your minds are in such a condition that you truthfully can say that you have an abiding conviction that the charge is true, then you have no reasonable doubt and it becomes your duty to so declare by your verdict.

It frequently becomes necessary for counsel to advise the jury what, in their judgment, the law is. This is in order that they may properly analyze

the evidence in support of their contention, but it is understood that [30] such statements of law given by counsel are not binding upon the jury and you are advised that you must look to the court for the law, and you will accept the instructions of the Court as the law in the case.

You are instructed that the United States Constitution grants no immunity from military service because of religious convictions or activity, but immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objectors and holy calling, and that the term "minister of religion" must be interpreted according to the intent of Congress and not according to the meaning attached to it by members of any particular group.

It is the function of the Selective Service Boards, duly appointed and organized according to law, to classify registrants and to fix the time for their appearance and to assign them according to their classification.

The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

If you find that the Government has proved these allegations then you will find the defendant guilty as charged otherwise you will acquit him. [31]

You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho.

It is necessary in this Court that you all agree in arriving at a verdict. When you retire to your jury room you will elect one of your number as foreman, and when you have arrived at a verdict your foreman alone need sign it, and it will then be returned into open Court.

A verdict has been prepared for your use, and you will insert in the blank space the word "guilty" or the words "not guilty" to conform with your findings.

You will now retire with the bailiffs who will be sworn.

Just a minute before the jury retires. ~~X~~ Do you want to take any exceptions. [32]

Mr. Lessard: The defendant excepts to the instructions of the Court to the jury in which the Court withdrew from their consideration any action concerning the classification of the defendant and the unfairness of the classification by the Jackson County Board No. 2.

Also, I didn't have time to prepare an instruction but made my request, and the instruction would be the same as requested in the Thompson case.

The Court: The record may show that the same instruction was requested and refused.

Mr. Lessard: And may we have an exception to that ruling.

The Court: Yes. And now the jury may retire to consider their verdict.

[Endorsed]: Filed Nov. 25, 1944. [33]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and Address of Appellant. Wesley William Cox, Star Route, Ashland, Oregon.

Name and Address of Appellant's Attorney. Dellmore Lessard, 505 Corbett Bldg., Portland, Oregon,  
Offense. Desertion from Civilian Public Service Camp.

Date of Judgment, October 25, 1944.

Brief Description of Judgment or Sentence.

Three years and three months in a Federal Penitentiary to be selected by Attorney General and \$300. fine.

Name of Prison Where Now Confined If Not on Bail. Defendant on \$5000.00 bail.

I, Wesley William Cox, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

1. Denial of motion for a directed verdict of "Not Guilty" at the conclusion of the presentation of the Government's case;

2. Denial of motion for a directed verdict of "Not Guilty" at the conclusion of the trial;

3. Refusal of Trial Court to give requested instruction to the jury;

4. The giving of the Trial Court's instruction to the Jury that they cannot consider irregularities on the part of Jackson County Board No. 2, Selective Service, of the State of Oregon, and withdrawing from the consideration of the jury all consideration of the discrimination of the said draft board against this defendant in refusing to classify him as IV-d, and giving him classification IV-e against his will and without his consent.

5. Denial of the Trial Court of defendant's motion [34] for a judgment of "Not Guilty" notwithstanding the verdict of the jury, or in the alternative for a new trial.

**WESLEY W. COX**

**Appellant**



Dated: October 25, 1944.

Received a copy of the above Notice of Appeal this 25th day of October, 1944.

R. W. BECKWITH

Assistant U. S. District Attorney for the District of Idaho.

[Endorsed]: Filed Oct. 25, 1944. [35]

[Title of District Court and Cause.]

**SUPERSEDEAS—ORDER**

This cause coming on to be heard this 26th day of October, 1944, upon the application of the defendant, Wesley William Cox, for an appeal to the Circuit Court of Appeals of the United States, and said appeal having been allowed:

It Is Ordered that the same shall operate as a supersedeas, the said appellant having executed a bond in the sum of Ten Thousand Dollars (\$10,000.00) as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the United States for the Eastern Division of the District of Idaho until the further order of the court.

Dated this 26th day of October, 1944.

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Oct. 26, 1944. [36]

[Title of District Court and Cause.]

**BAIL BOND ON APPEAL TO UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

State of Idaho,

County of Bannock—ss.

Know All Men By These Presents:

That we, Wesley William Cox, as Principal; and Charles F. Condart, of Idaho Falls, Bonneville County, Idaho, and P. W. Anderson, of Pocatello, Bannock County, Idaho, and Hilda Mark of Pocatello, Bannock County, Idaho, and Floyd Anderson of Pocatello, Bannock County, Idaho, as Sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 26th day of October in the year of our Lord One Thousand Nine Hundred and Forty Four.

Whereas, lately at the fall term, A. D. 1944, of the District Court of the United States for the District of Idaho, Eastern Division and on the 25th day of October, 1944 thereof, in a suit pending in said court between the United States of America, plaintiff, and Wesley William Cox, defendant, a judgment and sentence was rendered against the said Wesley William Cox, and the said Wesley William Cox has filed a Notice of Appeal to the United States Circuit Court of Appeals for the

Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said Notice of Appeal directed to the United States of America has been duly served, said Notice of Appeal being dated [37] on the 25th day of October, 1944 and service of said Notice of Appeal having been made on the 25th day of October, 1944.

Now, the condition of the above obligation is such, that if the said Wesley William Cox shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the 1st day of the next term thereof to be held at the City of San Francisco, California or such city as said court may hear the appeal, and from day to day thereafter during said term and from term to term and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

**WESLEY WILLIAM COX**

**Principal**

**CHARLES F. CONDART**

**P. W. ANDERSON**

**HILDA MARK**

**FLOYD ANDERSON**

**Sureties [38]**

United States of America,

State of Idaho, County of Bannock—ss.

I, Charles F. Condart, a citizen of the State of Idaho, and Obligor in the above undertaking, do solemnly swear that I am a resident of the State of Idaho, in the County of Bonneville; that my post office is in the town of Idaho Falls, Idaho therein, that I own real estate over and above all my debts, liabilities, and exemptions under homestead and appraisement laws to the amount of Ten Thousand Dollars (\$10,000.00) subject to execution in the State of Idaho.

CHARLES F. CONDART.

Subscribed and Sworn to Before me this 26th day of October, 1944.

(Seal)

W. D. McREYNOLDS.

Clerk of U. S. District Court, District of Idaho,  
Eastern Division.

I certify that the above Surety is in my opinion sufficient in said case.

(Seal)

W. D. McREYNOLDS.

Clerk of District Court, U. S., District of Idaho,  
Eastern Div.

State of Idaho,  
County of Bannock—ss.

We, P. W. Anderson, Hilda Mark and Floyd Anderson, are citizens of the State of Idaho, and Obligors in the above undertaking and do solemnly swear that we are residents of the State of Idaho in the County of Bannock, and that our post office is in the town of Pocatello, Idaho therein; that we own real estate over and above all our debts, liabilities and exemptions under homestead and appraisal laws to the amount of \$10,000.00 subject to execution in the State of Idaho.

P. W. ANDERSON

HILDA MARK

FLOYD ANDERSON [39]

Subscribed and Sworn To Before me this 26th day of October, 1944.

(Seal)

W. D. McREYNOLDS.

Clerk of U. S. District Court, Dist. of Idaho, Eastern Div.

I certify that the above Surety is in my opinion sufficient in said case.

(Seal)

W. D. McREYNOLDS.

Clerk of U. S. District Court, Dist. of Idaho, Eastern Div.

Approved as to form only. 10/26/44.

R. W. BECKWITH,

Asst. U. S. Atty.

[Endorsed]: Filed Oct. 26, 1944. [40]



[Title of District Court and Cause.]

**ORDER RELEASING DEFENDANT ON BAIL  
PENDING APPEAL**

The defendant, Wesley William Cox, in the above entitled cause, having on the 26th day of October, 1944 filed with the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, his appeal bond in the sum of Ten Thousand Dollars (\$10,000.00), which said bond has been approved by W. D. McReynolds, Clerk of District Court of U. S., for the District of Idaho, Eastern Division as directed by this court, at the time of fixing the bond and the said bond now being approved by the court:

It Is, Therefore Ordered, that the said Defendant, Wesley William Cox, shall be released from custody of the U. S. Marshal for the State of Idaho or such other person as shall have the custody of said defendant, he, the said defendant now being under bond for his appearance pending his appeal.

Dated this 26th day of October, 1944.

**CHASE A. CLARK**

District Judge.

[Endorsed]: Filed Oct. 26, 1944. [41]

[Title of District Court and Cause.]

**ASSIGNMENT OF ERRORS**

Comes now the defendant and appellant, Wesley William Cox, and files the following Assignment of

Errors upon which he is relying on appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

That the Court erred in not permitting the defendant to show, and in not permitting the jury to consider that the order of Selective Service Board No. 2, of Jackson County, Oregon, upon which the indictment herein was based is void, because the defendant is a minister of religion exempt from all duty of training and service, for the reason that it was made (a) in excess of authority of the said board, (b) beyond the jurisdiction of the said board (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution of the United States by depriving defendant of rights and liberty without due process of law, and (h) in violation of the Regulations of Selective Service.

II.

That the Court erred in refusing to grant defendant's motion for a judgment of acquittal, and for a directed verdict, made at the close of all of the evidence.

III.

That the Court erred in charging the jury that it could not consider the illegal and unconstitutional action of Local Selective Service Board No. 2, of Jackson County, Oregon, and in limiting the issue to be decided by the jury as to whether or

not the defendant knowingly deserted the Civilian Public Service Camp. [42]

IV.

The trial Court erred in refusing to submit the requested instruction to the jury permitting the said jury to consider whether or not the local draft board had acted in an illegal and unconstitutional manner in classifying the defendant and in ordering him to report to said CPS Camp.

V.

That the trial Court erred in denying defendants motion for a judgment of "Not Guilty" notwithstanding the verdict of the jury, or in the alternative for a new trial.

VI

That the Court erred in imposing any sentence against the defendant herein.

**DELLMORE LESSARD**

Attorney for defendant.

Due service accepted this 20th day of November, 1944.

**JOHN A. CARVER**

United States District Attorney  
for the District of  
Idaho.

By **R. W. BECKWITH**

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 20, 1944. [43]

[Title of District Court and Cause.]

### ORDER

On motion of counsel for the defendant in the above entitled case, and for good cause shown,

It Is Ordered That time for settling and filing Bill of Exceptions on the appeal of the cause be, and the same hereby is, extended to the 18th day of December, 1944.

Dated this 20th day of November, 1944.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed November 20, 1944. [44]

[Title of District Court and Cause.]

### BILL OF EXCEPTIONS.

Be It Remembered That the above entitled case came on regularly for trial on Tuesday, October 24, 1944 in the above entitled Court at Pocatello, Idaho, before the Honorable Chase A. Clark, Judge Presiding. A jury having been duly empaneled and sworn to try the issues as by law provided. The United States of America appeared by Messrs. John A. Carver, United States District Attorney, and E. H. Casterlin and R. W. Beckwith, assistants, all of Boise, Idaho. The defendant appeared in person and by his attorney, Dellmore Lessard, of Portland, Oregon.

The appealing defendant respectfully submits the following Bill of Exceptions:

**EXCEPTION No. 1**

The plaintiff having concluded and rested after submitting all evidence on behalf of the Government, the defendant moved for a directed verdict of "Not Guilty" upon the ground that inasmuch as the defendant had obeyed all administrative processes and orders of Local Selective Service Board No. 2, of Jackson County, Oregon, and had reported to the Civilian Public Service Camp as ordered by said board that it was incumbent upon the Government to prove, and it had failed to prove that the said local board had considered any evidence whatsoever tending to dis-prove defendant's claim to be a minister of the Gospel. That as shown by the evidence introduced on behalf of the Government, the said board has capriciously and arbitrarily given the classification of IV-e (Conscientious Objector) to the defendant after he had informed them that he was not a conscientious objector and did not want said classification. That for said reasons the classification of IV-e having been given to the defendant wrongfully and unlawfully, the order to report to the Civilian Public Service Camp was void, [45] and defendant had committed no crime in failing to obey said order.

But the Court denied defendant's motion, and allowed an exception.

**EXCEPTION No. 2**

The Court thereupon proceeded with the said trial and after both parties had concluded and submitted their evidence the defendant renewed his



motion for a directed verdict of "Not Guilty" upon the same grounds as set forth in Exception No. 1.

But the Court denied defendant's motion, and allowed an exception.

### EXCEPTION No. 3.

That thereafter and before the Court had charged the jury the defendant requested the Court to give an instruction substantially as follows, to-wit:

"The Court instructs you that it is your duty to determine whether or not the defendant is a minister of religion of the sect known as Jehovah's Witnesses, and if you so determine it will be your duty to acquit the defendant because under the law all ministers of religion are exempt from training and service and defendant, if a minister of religion would not be required to report at the Civilian Service Camp as ordered by the Local Selective Service Board No. 2, of Jackson County; Oregon."

That the Court refused to give said charge, and defendant excepted to the Court's ruling.

### EXCEPTION No. 4

That the Court thereupon charged said jury, and as part of said charge gave the following:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was as-

signed as set out [46] in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67 at Downey, Idaho."

To the giving of which charge the defendant excepted.

**EXCEPTION No. 5.**

The said cause having been submitted to the jury by the Court under its charges, and the jury having deliberated and rendered a verdict against the defendant on October 24, 1944, at the term of Court aforesaid, the defendant made and submitted to the said Court his motion for a judgment notwithstanding the verdict of the jury, and in the alternative for a new trial, on the ground of error committed

5

by the Trial Judge at the time of trial in that the Trial Judge refused to give the charge submitted by the defendant, and in that the Trial Judge refused to permit the jury to consider the question of whether or not the order of the Selective Service Board upon which the indictment was based, was void because of defendant's being a minister of religion and exempt from all training and service.

On October 24, 1944 the said motion came on to be heard, and upon consideration of said motion the Court on the same day denied the same, to which ruling the defendant excepted.

In connection herewith there is hereto attached a full [47] transcript of the testimony introduced in this cause, and all exhibits introduced at the said trial, certified by the Official Court Reporter, and made a part of this Bill of Exceptions.

**DELLMORE LESSARD**

Attorney for defendant and  
appellant.

United States of America,  
District of Idaho—ss.

It Is Hereby Certified that on the 29th day of November, 1944 the Honorable Chase A. Clark, Judge of the above entitled Court, for good cause shown entered an Order allowing defendant Wesley William Cox, to have to and including December 18, 1944, for settlement and filing of Bill of Exceptions and Assignment of Errors, in respect to the within appeal.

It further appearing that there is attached hereto a full transcript of the testimony offered and all exhibits introduced herein and made a part of this Bill of Exceptions.

It Is Further Certified That the foregoing Exceptions asked and taken by the Defendant, Wesley William Cox, were duly presented within the time fixed by law and the Order of this Court, and the Bill of Exceptions is by me allowed and signed this 14th day of December, 1944.

**CHASE A. CLARK**

Judge of the District Court of the United States  
for the District of Idaho.

United States of America,  
District of Idaho—ss.

Due service of the within Bill of Exceptions is hereby accepted in Boise, Idaho, this 11th day of December, 1944, by receiving a copy thereof, duly certified to as such by Dellmore Lessard, attorney for defendant and appellant.

**R. W. BECKWITH**

Asst. U.S. District Atty.

[Endorsed]: Filed Dec. 14, 1944. [48]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR FILING OF  
TRANSCRIPT OF RECORD ON APPEAL**

On motion of counsel for the defendant in the above entitled case, and good cause shown,

It Is Ordered That the time for the filing of the Transcript of the Record on Appeal in this cause, be and the same is hereby extended to December 20, 1944.

Dated this 30th day of November, 1944.

CHASE A. CLARK

Judge.

Service of above admitted 11-30-44

R. W. BECKWITH

Asst. U.S. Atty.

[Endorsed]: Filed Nov. 30, 1944. [49]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF  
ORIGINAL EXHIBITS

On motion of counsel for the defendant in the above entitled case, and for good cause shown,

It Is Ordered that all of the exhibits herein introduced by both parties hereto be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeal for the Ninth Circuit in their original form.

Dated this 30th day of November, 1944.

CHASE A. CLARK

Judge.

Service of above admitted 11-30-44.

R. W. BECKWITH

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 30, 1944. [50]



[Title of District Court and Cause.]

**STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY  
ON APPEAL**

Appellant hereby adopts as his points on appeal the assignments of error heretofore placed on file herein.

Dated at Portland, Oregon this 16th day of December, 1944.

**DELLMORE LESSARD**

Attorney for defendant and  
appellant.

Service of above admitted 12/18/44.

**R. W. BECKWITH**

Asst. U. S. Atty.

[Endorsed]: Filed Dec. 18, 1944. [51]

[Title of District Court and Cause.]

**AMENDED PRAECIPE TO CLERK**

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

I. Indictment.

2. Record of plea of not guilty.
3. All exhibits.
4. Verdict of jury.
5. Judgment of the Court and sentence.
6. Transcript of testimony.
7. Notice of appeal.
8. Supersedeas—Order.
9. Bail Bond on Appeal.
10. Order releasing defendant on bail pending appeal.
11. Assignment of Errors.
12. Bill of Exceptions.
13. All orders extending time.
14. Statement of points upon which appellant intends to rely.
15. This praeceipe.

Dated at Portland, Oregon this 16th day of December, 1944.

**DELLMORE LESSARD**

Attorney for defendant and  
appellant.

Received a copy of above this 18th day of December, 1944.

**R. W. BECKWITH**

Asst. U. S. District Atty.

[Endorsed]: Filed Dec. 18, 1944. [52]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK OF UNITED  
STATES DISTRICT COURT OF  
TRANSCRIPT OF RECORD**

United States of America,  
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 52, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$6.95, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of December, 1944.

[Seal] W. D. McREYNOLDS  
Clerk. [53]

[Endorsed]: No. 10917. United States Circuit Court of Appeals for the Ninth Circuit. Wesley William Cox, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed December 23, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD FOR PRINTING

Appellant hereby adopts as the points upon which he intends to rely on appeal the statement of points appearing in the transcript of the record herein which are the same points as set forth in his Assignment of Errors, also appearing in the transcript herein.

Appellant hereby designates the entire record as

certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for printing in the transcript.

Dated at Portland, Oregon this 3rd day of January, 1944.

**DELLMORE LESSARD**

Attorney for appellant.

State of Oregon,

County of Multnomah—ss.

I, Dellmore Lessard, being first duly sworn, say: That I am the attorney of record for the appellant in the above entitled cause. That John A. Carver is the United States District Attorney for the District of Idaho, and is the attorney for the appellee herein. That the office of said John A. Carver is U. S. Court House, Boise, Idaho. That there is a regular communication daily by mail between my office in Portland, Oregon and Boise, Idaho. That on the 3rd day of January, 1945 I served a copy of the above by depositing said copy in the post-office at Portland, Oregon, inclosed in a sealed envelope, addressed to said John A. Carver at the address aforementioned, and prepaid the postage thereon.

**DELLMORE LESSARD**

Sworn to and subscribed before me this 3rd day of January, 1945.

[Seal] **ALBERT A. ASBAHR**

Notary Public for Oregon.

My Com Exp Oct 27, 1947.

[Endorsed]: Filed Jan. 6, 1945. Paul P. O'Brien, Clerk.



**No. 10917**

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IN THE  
**United States Circuit Court of Appeals  
For the Ninth Circuit**

\_\_\_\_\_  
**WESLEY WILLIAM COX,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

\_\_\_\_\_  
**Upon Appeal from the District Court of the United States  
for the District of Idaho  
Eastern Division**

\_\_\_\_\_  
**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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United States Circuit Court of Appeals  
for the Ninth Circuit •

Excerpt from Proceedings of  
Monday, September 17, 1945

Before: Stephens, Healy and Bone, Circuit  
Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Dellmore  
Lessard, counsel for appellant; and by Mr. E. H.  
Casterlin, Assistant United States Attorney, counsel  
for appellee, and submitted to the court for con-  
sideration and decision.

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of  
Friday, September 27, 1946

Before: Stephens, Healy and Bone, Circuit  
Judges.

[Title of Cause.]

**ORDER WITHDRAWING OPINION, SET-  
TING ASIDE JUDGMENT AND RESUB-  
MITTING CAUSE**

The opinion of this Court heretofore filed on the 5th day of April, 1946, in the above entitled matter is withdrawn. The decision entered in accord with the referred to opinion is hereby set aside. The appeal is hereby submitted to the court for opinion and decision upon the oral argument made and the briefs heretofore filed upon the appeal and upon the briefs heretofore filed on the motion for a rehearing.

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of  
Friday October 4, 1946

Before: Stephens, Healy and Bone, Circuit  
Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION  
AND FILING AND RECORDING OF  
JUDGMENT**

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

*Wesley William Cox vs.*

In the United States Circuit Court of  
Appeals for the Ninth Circuit

No. 10,917

**WESLEY WILLIAM COX,**

Appellant,

vs.

**UNITED STATES OF AMERICA,**

Appellee.

No. 10,928

**THEODORE ROMAIN THOMPSON,**

Appellant,

vs.

**UNITED STATES OF AMERICA,**

Appellee.

Upon Appeals from the District Court of the  
United States for the District of Idaho

No. 10,942

Oct. 4, 1946

**WILBUR ROISUM,**

Appellant,

vs.

**UNITED STATES OF AMERICA,**

Appellee.



Upon Appeal from the District Court of the United  
States for the District of Oregon

Before: Stephens, Healy and Bone, Circuit  
Judges.

Stephens, Circuit Judge.

### OPINION

These cases were heretofore decided, but upon petition of the United States this court set aside its decision and withdrew its opinion, and ordered the cases resubmitted upon the original briefs and argument, supplemented by the briefs filed for and against the petition for rehearing.

Wesley William Cox and Theodore Romaine Thompson were indicted by a United States Grand Jury in the District of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U.S.C.A. App. § 311. Wilbur Rosium was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the inditees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309a)

as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 305 (d) acts to exempt "regular and duly ordained ministers of religion" from training or service but not from registration.

Appellants' claims as to exemption were at all times consistently, persistently and openly made by each registrant. These claims were the subject of competent proof to the boards through the registrants' questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of religious

training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal.

It is settled that the defense in the trial under § 311 upon this phase of the case can only go to the jurisdiction of the board<sup>1</sup> or to the inquiry as to whether or not the board discriminated against the registrant or considered his case arbitrarily or capriciously. While the courts have the power to convict or acquit in accordance with the evidence on these issues, they have no power to try the issue

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<sup>1</sup>*Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), ... U. S. ...; *Billings v. Truesdell*, 321 U. S. 542 (1944); *Falbo v. United States*, 320 U. S. 549 (1944).

of classification de novo. Since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely.

As stated by Mr. Justice Frankfurter in his opinion, concurring in the decision but not in the opinion of the majority of the court in *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), — U. S. — (1946), the controversial doctrine of jurisdiction of fact, treated in *Crowell v. Benson*, 285 U. S. 22 (1932), is suggested. That is, since ministers of religion are exempted from any service, the registrant under trial for violating § 311 may show the fact to be that he is a minister of religion and not merely that the evidence before the board was in substantial support of the board's classification. It will be recalled that it was decided in the latter case and other similar cases<sup>2</sup> that findings of fact of an administrative agency which go to the jurisdiction of the agency and which affect constitutional rights are not conclusive and may be tried by the courts de novo. Where only statutory rights are involved, as in our cases (ministers of religion have no constitutional rights to exemption from military or other service), the findings of fact

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<sup>2</sup>See *Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

are final if substantially supported by evidence before the agency. See *So. Chicago Co. v. Bassett*, 309 U. S. 251 (1940).<sup>3</sup>

Finding no error in any one of the three cases treated in this opinion, the judgments are affirmed.  
Affirmed.

[Endorsed]: Opinion. Filed Oct. 4, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10,917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the District of Idaho, Eastern Division.

<sup>3</sup>See also *Railroad Com'n. v. Rowan & Nichols Oil Co.*, 311 U. S. 570 (1941); *Local Draft Board No. 1 v. Connors* (CCA 9, 1941), 124 Fed. 2d 388; *Gudmundson v. Cardillo* (CCA D. C., 1942), 126 Fed. 2d 521; *Goff v. United States* (CCA 4, 1943), 135 Fed. 2d 610; *United States v. Messersmith* (CCA 7, 1943), 138 Fed. 2d 599.



This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Oct. 4, 1946.

*United States of America*

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United States Circuit Court of Appeals  
Ninth Circuit

No. 10917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA.

No. 10928

THEODORE ROMAIN THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA.

Upon Appeal from the United States District Court  
for the District of Idaho

No. 10942

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA.

Upon Appeal From the United States District Court  
for the District of Oregon

**APPELLANTS' JOINT PETITION FOR  
REHEARING**

May It Please the Court:

Now comes the appellants in the above entitled and numbered causes, by and through their counsel, and file and present this their joint petition for rehearing within the time prescribed by the rules of court and enlarged by the order of the court dated October 15, 1946, and pray that the judgments rendered and entered in these cases on October 4, 1946; be vacated and that a rehearing be granted.

The decisions and opinions of this court in these causes dated October 4, 1946, should be withdrawn and the decisions and opinion of this court dated April 5, 1946, should be reinstated and the judgments of the courts below reversed and remanded for new trial for each and every one of the reasons in the opinion of the court dated April 5, 1946. (See page 5 of the slip opinion dated April 5, 1946.)

This action should be taken so that the court's opinion will conform to and comply with the decisions and the opinion of the Supreme Court of the United States dated December 23, 1946, in the cases of Gibson v. United States, and Dodez v. United States (Nos. 23 and 86, October Term 1946) wherein the judgments upon facts and circumstances identical to the facts and circumstances here were reversed and ordered remanded to the trial courts for further pro-

ceedings consistent with the opinion. In its opinion in the Dodez case, the Supreme Court of the United States said:

"This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists, however, that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced, would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause. Accordingly he asks for a judgment here directing that such relief be given.

"In the Estep and Smith cases [327 U. S. 114], after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: 'We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.' 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith. Accordingly we remand the cause, as was done in the Smith and Estep cases, for further proceedings in the trial court, without expressing opinion upon those further issues."

In the Gibson case, the Government argued, as

its ground for affirmance in that case, the same ground that was urged by this court in its opinion dated October 4, 1946. This court said: "Since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely." (See slip opinion page 3.) In the brief for the United States on reargument in *Gibson v. United States*, No. 23, October Term 1946, the Government, inter alia, stated: "Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed on the ground that the information contained in petitioner's selective service file, which he offered in evidence, plainly shows that there was foundation in the facts before the boards for rejecting petitioner's claim to classification as a minister. . . . we think there was ample basis in fact for the boards' rejection of petitioner's claim." (See pages 7-8, 39-56 of Government's brief.)

Instead of affirming the judgment as requested, on the ground that petitioner was not illegally classified and unlawfully denied his claim for exemption, the court reversed the case and remanded Gibson's case to the trial court for a new trial. The court said: "Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the



merits, by examining and sustaining his defense. The same course should be followed for Gibson in this respect as was directed for Dodez. . . . The judgments are reversed and the causes are remanded to the District Courts from which they came, for further proceedings consistent with this opinion." (See *Gibson v. United States*, slip opinion, pp. 22-23.)

This court has held that the judgments should be affirmed because, upon the evidence, it appears that appellants were not illegally classified and denied their claims as ministers of religion within the meaning of the Act and therefore the District Courts did not commit any prejudicial error against appellants when the evidence appearing in the draft board files was excluded from consideration by the courts and juries, or when the courts instructed the juries that they could not consider the alleged illegality of the draft boards' determinations. In other words, this court held that the alleged error in denying appellants due process of law was harmless because appellants would not have been able to establish that the draft boards acted illegally, even if the District Courts had ruled properly.

This holding begs the question. It puts the cart before the horse. If there was denial of due process of law such denial cannot be cured by the finding of this court that appellants were allowed due process of law by the draft boards. Suppose the District Courts had denied appellants the right to counsel. Can it be reasonably said that such denial

could be cured by a finding of this court that appellants had no good defense to the indictments because their draft boards' files showed they were legally classified and therefore guilty of failing to remain at the Civilian Public Service Camps? Suppose the District Courts would have put them to trial upon information rather than indictments. Suppose the courts erroneously overruled a plea of former jeopardy. Suppose appellants were convicted upon confessions illegally obtained, contrary to the Constitution. Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because the draft boards' files showed appellants were legally classified and that they were guilty?

The mere asking of the questions answers with a resounding NO!

Since appellants were denied due process of law, as they claim, then there is only one method whereby that denial can be cured. That is to remand appellants' cases to the trial courts for new trials, so that upon retrials they will have opportunity to make their defenses. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the appellants are admittedly guilty, as the court held here.

The opinion of this court holding that the action of the trial courts, in refusing to consider or to permit the juries to consider the illegality of the

administrative action should not stand. A similar attempt was made by the Fourth Circuit Court of Appeals in *Smith v. United States*, 148 F. 2nd 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case (327 U. S. 114) in the Supreme Court of the United States. The Supreme Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. That Court did not consider the error harmless, as did this court, in its affirmance of the judgments here. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the trial court limited determination of the issues to whether the defendant complied with the order. In these cases the District Courts limited the determination to whether the appellants complied with the orders to remain at the camps. Moreover, in the *Smith* case, as well as in these cases, the trial court did not pass upon the legality of the administrative determination.

If this court can pass upon the validity of the administrative determinations after reviewing the draft board files, then the District Courts should have done so. Inasmuch as the District Courts failed to consider the legality of the administrative determinations, and failed to permit the juries to determine the legality of the administrative actions, the errors, which are denial of due process, cannot be cured by the rationalizing of this court in these cases. In the same way, the error in the *Smith* case

could not be cured by the rationalizing of the court of appeals. *Smith v. United States*, 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by the Supreme Court is best expressed by the last sentence of its opinion in the *Estep and Smith* cases (327 U. S. 114): "Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

If the United States Supreme Court was of the opinion that the performance of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of ministerial work, would be ground for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action, it would have so held in the *Smith* case. It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because this court is of the opinion that the draft boards did not err in making the classification. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error on the ground that the undisputed evidence shows that the defendant is guilty. The effort of this court to hold as harmless error the denial of due process by the District Courts is an effort to use appeal as a trial de novo of the guilt or innocence of appellants.



Only one court has jurisdiction to determine the guilt or innocence of appellants under the indictments and that is the District Court in each case. The failure of the District Courts to exercise judicial function does not authorize this court to reconsider the evidence de novo to determine whether or not appellants are guilty. The District Courts having failed to exercise their function in this regard cannot be exonerated from the violations of the Constitution because this court saw fit to allow appellants a full and fair trial on the alleged illegality of the administrative determination after their convictions. They were entitled to this consideration before conviction.

The holding of this court that, although the defense was available, the appellants' convictions should be affirmed because the draft board proceedings in each case were found to be valid, is an extraordinary departure from due process of law in appeal of criminal cases. The judgments of conviction are invalid because of the denial of the right to be heard in the District Courts on the validity of the draft boards' determinations. The denial of this right entitled appellants to reversals and new trials. The invalidity of the judgments because of the denial of the right, cannot be validated by this court's inquiring into the validity of the draft board proceeding in each case. Once the judgments are invalid the validity cannot be restored by this court's performing the judicial functions that the District Courts refused to perform.



Wherefore, for the reasons stated above, and on account of the arguments appearing in appellants' briefs filed herein and, above all, the reasons stated in this court's opinion filed in these cases on April 5, 1946, and the opinion of the Supreme Court of the United States filed in *Gibson v. United States* and *Dodez v. United States* (Nos. 23 and 86, October Term 1946, decided December 23, 1946); the relief prayed for herein should be granted.

**DELLMORE LESSARD,**

Corbett Building,

Portland 4, Oregon.

**HAYDEN C. COVINGTON,**

117 Adams Street,

Brooklyn 1, New York,

Counsel for Appellants.

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**CERTIFICATE**

I, Hayden C. Covington, counsel for appellants, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

**HAYDEN C. COVINGTON,**

Counsel for Appellants.

[Endorsed]: Joint petition for rehearing. Filed January 6, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Thursday,  
March 20, 1947

Before: Stephens, Healy and Bone, Circuit Judges.

[Title of Cause.]

**ORDER DENYING PETITION FOR  
REHEARING**

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed January 6, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED  
UNDER RULE 38 OF THE REVISED  
RULES OF THE SUPREME COURT OF  
THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1 to and including 73, to be a full, true and correct copy of the entire record, excluding original exhibits, transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of March, 1947.

[Seal]

PAUL P. O'BRIEN,

Clerk.

## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 9, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. The case is consolidated for argument with Thompson vs. United States and Roisum vs. United States, Nos. 1257 and 1258.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1462)